No. 2909.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TWENTY-ONE MINING COMPANY, a Corporation,
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, Inc., a Corporation,
Appellee.

BRIEF FOR APPELLANT.

W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN,
Attorneys for Appellant.

METSON, DREW & MACKENZIE and
E. H. RYAN,
Of Counsel.

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STATEMENT OF THE CASE.

This is an appeal from an order denying defendant's (appellant's) motion to dissolve a *pendente lite* injunction.

This litigation arises between conflicting lode claimants and involves common law, apex and extra-lateral rights.

Appellee filed a complaint at law which alleged ownership of a lode; that this lead apexed in plain-

tiff's location; that on its dip into the earth it departed through the side lines of appellee's (complainant's) location and beneath and under the surface of the location claimed by appellant (defendant below), and that defendant had wrongfully mined ores from plaintiff's said vein to appellee's (complainant below) damage.

Ancillary to this law complaint, appellee, filed a bill in equity (Tr., 1), reasserting all of the allegations of the complaint and further that defendant below (appellant here) was continuing and threatened to continue to stope from the designated area and praying for an injunction.

After answer filed (Tr., 32) and a hearing an injunction *pendente lite* (Tr., 91) was issued restraining defendant (appellant here) from mining within the disputed sector.

After the granting of this injunction complainant (appellee here) began mining within this same vein *under* defendant's surface, and *within* the enjoined sector and thereafter complainant admittedly extracted ore of a value of $7,000.00 and upward, and continues that waste.

Defendant moved the court below to dissolve the injunction because of this admitted violation by complainant below of its own injunction and the *status quo* (Tr., 94).

The court below denied the motion to dissolve and ratified this violation unless defendant should file a

bond in the sum of $30,000.00 running to the complainant (Tr., 112).

Defendant has not asked for a cross injunction.

There has been no trial.

Defendant below brings its appeal to this Court.

ASSIGNMENT OF ERRORS.

I.

The Court erred in refusing to dissolve the preliminary injunction *pendente lite* for the reason that the preliminary injunction was issued to maintain the *status quo pendente lite* and to this end was equally binding upon the defendant and the plaintiff.

II.

The Court erred in denying the motion to dissolve as the evidence offered on the hearing of the motion showed that the plaintiff was actually working in the segment of the vein in which the defendant was enjoined from working and which was the vein in dispute.

III.

The Court erred in denying defendant's motion to dissolve the preliminary injunction heretofore entered in this suit at the instance of complainant, for the reason that it appeared from the evidence submitted upon said motion that the complainant was actually

working within the segment of the vein and beneath the surface lines of the defendant, being the same area in which defendant was enjoined from working. By its refusal to dissolve said injunction, therefore, the said District Court has given the complainant by two steps, an injunction which enjoined defendant out of and complainant into possession, tied the hands of defendant with reference to working its own property and at the same time granted the complainant the right to work out the ore within the enjoined area. The result of which order will be that at the termination of this litigation irremediable damage will have been committed, and the subject-matter of the suit pending the litigation been destroyed by reason of this violation of the *status quo* by complainant.

IV.

The Court erred in ordering that the defendant might have a cross-injunction restraining the plaintiff *pendente lite* from prosecuting mining in the disputed vein, conditioned upon its giving a bond in the sum of thirty thousand dollars ($30,000) to indemnify the plaintiff for any damages it might suffer by such restraint.

V.

The Court erred in not ordering the plaintiff to maintain the *status quo* as a condition to a denial of

the motion to dissolve, as it appeared to the Court that plaintiff of its own motion had enjoined the defendant out of possession of the property in dispute and therefore if the injunction was sustained the plaintiff should not be left in a position to violate it.

ARGUMENT.

It is fundamental interlocutory injunction law:

(a) That an injunction *pendente lite* can have no function but to maintain the *status quo* until final determination;

(b) That complainant is as strongly bound by his own injunction as is the defendant.

(c) That a defendant cannot *pendente lite* be enjoined out of possession;

Through the injunction granted against defendant by the lower Court, the abuse of that process by the complainant, and the denial of defendant's motion to dissolve that injunction by reason of complainant's said violation, all of the above principles have been set at naught in the suit at bar.

The trial Court by sanctioning the complainant's continued stoping of the pay from the ledge in litigation, and in the enjoined sector and beneath our surface, unless defendant bond to complainant, has exceeded its jurisdiction, and *ex parte* made an in-

junction a writ of execution depriving defendant of its day in court and its right to a trial by jury.

An interlocutory injunction is self-acting against the complainant forthwith it is granted. It is active to maintain the "existing state of things" against the defendant, his agents and all others immediately service is made or knowledge thereof exists in them.

Complainant cannot enjoin defendant out of possession nor complainant into possession.

Injunction does not lie against defendant *pendente lite* not to interfere with complainant in performing certain acts changing the "existing state of things" because that would be equivalent to enjoining defendant out and plaintiff in.

Inasmuch as no part equals the whole there can be no qualification attached to an injunction thereby breaking it into pieces or successive steps.

The complainant cannot be enabled to possess indirectly that to which he is not directly entitled.

An injunction is self-acting against the complainant because of his activity in obtaining it and because an injunction binds all who have knowledge. The complainant from the inception has all knowledge. It is self-acting in its entirety against the complainant, otherwise the qualification might attach that complainant was only bound to respect his own injunction in the *event* that the defendant did not furnish a bond running to the complainant. The defendant consents or may be passive on the application for

the injunction; but usually strongly resists its being granted.

The defendant need not ask an injunction against complainant because the latter is bound by the rule of equity which prevents complainant from acting contrary to the injunction order.

The defendant must obey and so must complainant and everyone else.

The defendant has a right to rely upon the rule that complainant cannot violate his own process. The injunction binds all, everyone, and the defendant is as much protected by it against any act of the complainant as are all who have knowledge of its issuance bound to obey it.

The conduct of the affairs of life are, to some extent, more or less discretionary with those who participate therein. However, when a party comes into a court and becomes an actor and invokes its process he becomes at once bound by all the rules of law and equity; the procedure invoked controls all parties to the litigation. He having invoked the court's process cannot proceed along different avenues to suit his discretion. The Court's discretion supersedes all other.

As Pomeroy epitomizes it, complainant can have no equitable relief unless he acknowledges, concedes, admits and provides for all the equitable rights, claims and demands of his adversary.

The complainant has no bludgeon with which to

attack his unarmed opponent. He must proceed within the rule. So in the case at bar, the rule of equity is absolute that no one can violate his own injunction. The rule binds the complainant whether the defendant consent to the injunction, is passive thereto or resisted the same.

In fact it is the settled rule that when a defendant is brought into a Court of Equity an equitable right may be secured to defendant which that Court in conformity with its uniform methods would not and even could not have secured or awarded to him in a suit where defendant was plaintiff.

Any self-construed privilege as to working in defendant's ground that complainant might have taken advantage of before instituting legal proceedings, was automatically ended by the injunction. It restrained complainant as well as defendant. That is the rule; has been the rule of equity beyond memory and is not lightly to be set aside. The complainant cannot invoke the process of the Court and then abuse that process. Injunction is process and process only. When process issues it is not to be trifled with, varied or changed. It cannot be qualified by complainant, made use of at his pleasure, or disposed of according to his whim.

The Court cannot sanction any violation of its terms by complainant. It has been made a rule absolute to "preserve an existing state of things." The rule never has been qualified to mean—to preserve *against* the defendant but complainant may destroy—that de-

fendant shall not use the property but that complainant may enjoy its substance and return but a shadow.

The Court should not have read into the original process any terms—no "ifs," "may" or "in the event," as has been done here.

Suppose the defendant owner of a mine left a number of miners at work extracting ore from his mine and went abroad before litigation was contemplated. Complainant, asserting ownership of the vein being worked by defendant's men, obtains an injunction in defendant's absence and stopped these men from working. These poor employees would know nothing of how nor have any authority to protect the defendant in court.

Suppose the injunction order provided that complainant might work the disputed vein unless defendant forthwith furnished a bond running to complainant in the sum of $30,000. The defendant without any notice whatsoever would be deprived of his property rights without a day in court as he had no notice whatsoever of the injunction order and could be given none.

Suppose again that the defendant had no means and no credit with which to give the bond in the sum of $30,000, and upon being given notice of the injunction was unable to supply the designated bond?

Manifestly the defendant in possession of his own property could be enjoined out of the same and the complainant permitted to extract all the values therein

simply because of complainant's financial strength, although the defendant may have had by the assertion of his common law rights every ability to protect his property, which privilege, were he present, is guaranteed to him under the Constitution, were it not for the injunction order of the Court.

Suppose the ancillary bill here had been for a receiver and a receiver had been appointed to take charge of the disputed property, would the Court look with favor upon mining the pay shoot by either the complainant or defendant? If complainant did stope he would be no more a violator than here.

Defendant is in the physical possession of a mining location.

The Circuit Court of Appeals for this Circuit has adopted what was said by Judge Hawley, that "The "owner of the mine is right in saying: hands off any "and everything within my surface lines extending "vertically downward, until you prove that you are "working upon and following a vein which has its "apex within your surface claims of which you are "the owner."

Prima facie then this defendant has title.

He has the right to protect his property, using all force that is necessary so to do.

That is the organic law of this country, and beyond that, it is a natural right.

The same fundamental law guarantees the possession and title of this defendant to this same property

and to every part of it until his claimed title be adjudged invalid after a trial in court and a verdict of a jury.

There can be no new procedure or practice that will hamper or limit that constitutional right. No proceedings can be initiated or crystallized by legislatures or by courts that can in advance of that final judgment, determine that title.

It must be obvious that no ingenuity of counsel, no pretense of following pretended forms of law can carve out one atom of that right. No sophistry, no court burdens may take that title from the defendant, short of the judgment provided by the constitution.

It takes revolutions to overthrow constitutions and it is revolutionary to attempt to circumscribe or weaken defendant's title contrary to the foundation law.

The primary proposition of injunction *pendente lite* has been violated in this proceeding.

The very idea of an injunction is to prevent waste and irreparable injury.

If the damage is not irremediable an injunction will not issue.

Its intent is to preserve the *status quo;* to prevent destruction of the substance of the litigation.

May the Court sanction the plea of complainant that the defendant is committing an injury that de-

stroys the *subject* of the suit, and then the complainant having tied defendant's hands upon that kind of a prayer, be permitted to go into the enjoined territory and perform the very act of destruction enjoined by removing the *corpus* of the suit itself, so that at the end of the litigation there is nothing as to which a court determination can be obtained?

"Judgment" has been arrived at by injunction and by complainant helping itself to the ore in litigation and appropriating the same to its own use.

The unquestioned law is that the owner of the surface has title beneath all the same to the center of the earth.

It has never been refuted that the owner of land shall have his day in court and that his title shall never be overthrown therein, except upon a trial, and if demanded, before a jury of his peers.

Equity has no jurisdiction to try title to land.

It is only those who have a clear legal title to land, *as well* as its actual possession, who have the right to claim the aid of a Court of Equity to even quiet title.

It is unheard of that a bill in equity, ancillary to an action at law, may be a foundation for the destruction of a defendant's title assailed in the only proper and legitimate way, i. e., by an action at law.

It has until this proceeding been unthought of, that something ancillary and helpful to a basic action may become the full power whereby that which is attacka-

ble in but the above suggested one lawful way, may be made waste of and destroyed by the incident.

An ancillary bill in a suit in equity can never be given vigor enough to destroy the defendant's title, and while the action at law upon which the equity suit is based is still untried, oust the defendant and crown the complainant with all a victor's laurels.

There is no such jurisdiction in the Federal District Court.

This is *statutory* and jurisdictional. The bill herein is ancillary to the action at law. It was filed for the purpose of aiding the action at law. It can have no other object than to preserve the subject-matter of "the action" pending the litigation. If more is claimed then the trial Court has no jurisdiction beyond that object. When process issued under the ancillary bill, it said "refrain from destruction, maintain the *statu quo.*" That was express and it bound all the world-actors, aiders, agents, employees—all. It was as it were, *in rem,* i. e., as to the status of the property, the subject of the litigation. So far jurisdiction existed to preserve—not for complainant but to preserve the property—to maintain a *statu quo.* Ancillary bills give jurisdiction to aid, no more, nor less.

How far afield has gone the proceeding now at bar.

With the action at law still untried, upon a simple motion the complainant deprives the defendant of his common law rights of title and steps into the vein

within the enjoined territory beneath the defendant's surface and removes the ore, the subject-matter of the action, while the defendant helplessly looks on.

Equity this?

Under what definition of equity may the defendant thus be chained, and while in that condition the subject-matter of the action and of the suit extracted from within the walls of the country rock, the eyes picked out of the mine?

When the trial comes on there is nothing that is not MOOT for the Court to determine.

The defendant has the empty shell and the complainant has the yellow gold contents—the proceeds of the very subject-matter of the litigation.

All this result, not under the Constitution which says that every man is entitled to have his day in court before a jury. Defendant has had not that, nor even yet the determination of the issues tendered under an ancillary bill, which by every definition can only aid in the action at law to the extent that it may bring about and maintain a *statu quo* pending the determination of the issues involved in the action at law. Defendant's property has been confiscated upon a mere motion deciding a minor issue presented under the ancillary bill.

Upon no ultimate allegation but upon one incidental element only the defendant is despoiled from ever working what *prima facie* is its own. It is obliged to stand quietly and see the complainant, with

the sanction of the lower Court, absorb that which the complainant insists as against the defendant can only be done by the commission of irreparable injury.

If *status quo* means holding as is; if injunction means holding in *statu quo,* and prevention of destruction of the subject-matter of litigation, is the destruction by complainant different legally than destruction by the defendant?

In support of its decision, the Court below cites in its opinion but two cases, namely, *Maloney* v. *King* (Mont.), 76 Pac., p. 940, and *Johnson* v. *Hall* (Ga.), 9th S. E., 783.

We earnestly suggest there is no applicability of the facts in the case of *Maloney* v. *King* to those in the case at bar.

That decision was made by the Supreme Court of Montana May 23, 1904.

The litigation involved dip rights. Plaintiff filed suit for damages for trespass beneath its surface and for an injunction and to quiet title. The defendants answered denying trespass and set up ownership in the vein and dip rights beneath plaintiff's claims and asked that defendants' title be quieted.

An interlocutory injunction was issued against defendants "from entering and trespassing upon . . . " or digging . . . underneath . . . the plaintiff's

" claim . . . and from extracting . . . and in-
" terfering . . . within surface lines extended ver-
" tically downward."

Plaintiffs' injunction was affirmed on appeal.

Defendants, soon after plaintiffs' injunction was granted, instituted a new suit against plaintiffs, alleging trespass on the same vein and asked for an injunction and this injunction was denied. Said defendants as plaintiffs dismissed that case and commenced a new suit against the original plaintiffs and again applied for a temporary injunction and this suit was dismissed. The Supreme Court of Montana then said as follows:

> "The practice pursued by defendants in this regard cannot be countenanced or approved of by this Court, for at least two reasons:
>
> "1. The object of defendants sought to be accomplished by these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. However desirable such result would seem to be, it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief. Upon a hearing, if the Court concluded that a proper showing had been made, it would undoubtedly have granted the relief sought. The policy of the law is to prevent useless litigation, and, whenever a proceeding is instituted broad enough in its character to include the hearing and determination of all existing issues

between the parties touching the same subject-matter, such issues should all be presented for determination in that suit, and neither the Court nor the parties be vexed with separate suits."

It appeared further that the original defendant after the above mentioned proceedings began various other suits as plaintiffs against the plaintiff in the original suit, whereupon the plaintiffs in the original suit asked that the preliminary injunction in the original suit be enlarged to restrain defendants in the original suit from bringing any actions, etc., and the Court extended the injunction. From this enlarged injunction order the defendants in the original suit appealed. The Supreme Court then say:

"To hold that the defendants could not mine any ore in the disputed territory, could not take away or convert to their own use any of the ores, rocks, or minerals therein, could not interfere with any portion of the premises, or any part thereof, or any of the rocks, ores, or minerals therein, but that they might recover the same, or the value thereof, after plaintiffs had extracted them, while a suit was pending the purpose of which was to determine the rights of the parties to the veins from which the ore was extracted, would be, at least, anomalous. The legal effect of the original injunction being the same before as after amendment, and this Court having affirmed the granting thereof, no error could be predicated upon the order appealed from.

"We therefore advise that the order appealed from be affirmed."

Thus it will be seen that the case of *Maloney* v. *King* was simply an appeal by defendants from an order extending the terms of an injunction *pendente lite* against the defendants in the first suit filed. Its original injunction suit was followed by the defendants in that case instituting trespass suits for the recovery of certain ores extracted and others for the value of certain converted ores from the same vein in controversy to the number of nine. Whereupon the original plaintiff asked that the original preliminary injunction be enlarged to restrain defendants from bringing such actions.

Then the original defendant appealed from the order extending the original injunction restraining defendants from becoming plaintiffs in other suits respecting the same property. Therefore the only matter before the Court on appeal was the enlargement of the original injunction order.

The Supreme Court of Montana sustained the lower Court.

This decision of the Supreme Court of Montana in *Maloney* v. *King* is characterized in *Lindley on Mines* at Sec. 872, page 2193, 3rd edition, as follows:

> "The Supreme Court of Montana has held in a confused case that the defendant's failure to move for a cross injunction when the complainant's injunction was granted, prevents him from subsequently obtaining relief. This ruling seems unfortunate. The defendant ought not to be re-

quired to anticipate the complainant's violation of the spirit of his own injunction and his abuse of the Court's process."

We cannot see that the Supreme Court of Montana meant any infringement of the general rule that plaintiff could not violate its own process. In fact, the concluding quotation from *Maloney* v. *King* seems to suggest the very procedure followed by the defendant in the case at bar as proper.

We do not see anything in the case to support Judge Lindley's conclusion except that the opinion is somewhat confused.

What the Montana Court criticised was the defendants instituting new suits instead of calling to the attention of the Court the violation of the injunction by the complainant therein. There the complainant was the owner of the surface and protecting its own common law rights, whereas the reverse proposition exists in the case at bar because the defendant is *prima facie* the owner of the property and *prima facie* entitled to judgment.

The concluding paragraph of the opinion in *Maloney* v. *King* is applicable to our theory but not to our opponents' views.

In the case of *Johnson* v. *Hall,* 9 S. E. Rep., p. 783, from the Supreme Court of Georgia, complainant filed a bill for an injunction.

Upon hearing the case the Court enjoined the defendants and required Johnson, the complainant, to

give a bond according to the act approved October 13, 1885 (Acts 1884-85, p. 93).

Later the defendant filed a cross bill against complainant alleging that Johnson was doing the very acts which they had been restrained from doing, to wit: cutting and boxing trees, and praying an injunction.

Upon hearing, the Court enjoined the original complainant but did not require the original defendant to give a bond as had been required of the original complainant on the first injunction. The original complainant appealed.

The Supreme Court of Georgia said:

> "The Court committed no error in the ruling complained of. It appears from the record in this case that both of these parties are *bona fide* claimants to this lot of land. When Hall & Bro. were enjoined from trespassing thereon, upon the application of Johnson, Johnson had no right to commit the very act which Hall & Bro. had been enjoined from committing. Where both parties in good faith claim title to the same tract of land, and one of them is enjoined from entering or trespassing thereon upon the application of the other, the object of the injunction is to preserve the land *in statu quo* until the title is settled by the proper proceedings. The plaintiff has no more right to disturb the *statu quo* than the defendants had; and it follows, as a matter of course, that, when the plaintiff undertook to commit the same acts that the defendants had been enjoined from committing, the Court should have restrained him also, it appearing that both parties *bona fide* claimed the land. 1 High., Inj., Sec. 679."

But the Georgia Court went further and said they believed the original defendant on his cross bill should give a bond to Johnson.

This was because of the statute cited which required a bond upon an application for an injunction or for some other reason which does not appear; but in any event the original defendant became an actor, the original defendant asked for an injunction. The Georgia Statute must have required an injunction bond upon getting an injunction and the Court required such as the Statute was being used as a basis that the injunction be given.

It will be seen that 1 *High on Inj.,* Sec. 679, is given as authority by the Supreme Court of Georgia for the fact that the injunction is to maintain a *statu quo,* and that the complainant who brought about a *statu quo* could not violate it; and in the text of Section 679 of *High on Injunctions* the Wisconsin case of *Haight* v. *Lucia,* hereinafter cited, is given as authority for the proposition that the complainant will be prevented from violating his own process and abusing the same.

There was still another case cited to the Court below by counsel for our opponents but the same is not mentioned in the opinion of the Court.

That case was *Anaconda Co.* v. *Pilot Butte Co.,* 153 Pac., 1006.

The defendant in that case appealed against a temporary injunction which was given in a suit to quiet

title wherein the defendant counter-claimed as to its title.

When the action was commenced both parties applied for an injunction *pendente lite.*

The Court enjoined the defendant from mining within certain lines extended in their own direction on the plaintiff's so-called Emily vein.

The defendant's injunction was refused. The Supreme Court said furthermore the plaintiff was required to maintain *pendente lite* the present status as to that Emily vein below the 1800 foot level under the surface of defendant's claim and said, "Except as to that of course the application of defendant for the injunction was refused."

Inasmuch as the defendant's application for an injunction was refused and the Court said "except as to preserving the status below the 1800 foot level," the application was refused, the Court meant nothing else than that plaintiff was enjoined by the injunction that the complainant secured just as much as the defendant was enjoined.

The Supreme Court further said:

> "The order in legal effect grants a reciprocal injunction restraining both parties. If plaintiff should disregard it the Court would punish for contempt and thus preserve the vein until final judgment."

That is just exactly the case at bar and is what we have been contending for at all times.

We submit that these three cases are no basis on which to predicate the decision of the Court below; and respectfully further submit that the law of this case is as we have perhaps inadequately stated it, but which the authorities herewith submitted amply bear out.

AUTHORITIES.

OBJECT OF PRELIMINARY INJUNCTION IS TO PRESERVE STATUS QUO.

A preliminary injunction has been defined as follows:

> "It decides no fact, fixes no right and it is not at all necessary to final determination of the case. It is *mere process* of the Court issued to hold in *statu quo* the subject-matter upon which the decree is to operate until the Court should be enabled to ascertain and adjudicate the rights of the parties."

Tebo v. *Hazel*, 74 Atlantic, 846.

> "An injunction being the 'strong arm' of equity, is never granted except in a clean case of irreparable injury, and upon full conviction on part of court of its urgent necessity."

Sec. 22, *High on Injunctions.*

> "The *sole object* of an interlocutory injunction *is to preserve the subject* in controversy in its then condition and, without determining any question of right, merely to prevent the further perpetra-

tion of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered."

Sec. 4, *Id.*

"It is to be constantly borne in mind that in granting temporary relief by interlocutory injunctions courts of equity *in no manner anticipate the ultimate determination of the questions involved.* They merely recognize that a sufficient case has been made out to warrant the preservation of the property or rights in issue in *statu quo* until a hearing on the merits without expressing or indeed without the means of forming a final opinion as to such rights."

Sec. 5, *Id.*

"Since the object of a preliminary injunction *is to preserve the statu quo* the court will not grant such an order where its effect would be to change the status."

Sec. 5-A, *Id.*

"Upon an application for injunction affecting the title to real estate, the proper office of the Court is not to ascertain the legal existence of a right, *but solely to protect the property* until that right can be determined by the tribunal to which it properly belongs."

Spelling on Injunctions (Sec. 181).

"Their object is to preserve the property in dispute in *statu quo,* and to protect it from injury until the hearing or further order."

Beach on Injunctions, Vol. I., Sec. 109.

"As the object of a preliminary or temporary injunction is merely to preserve the property in dispute in *statu quo* and to protect it from injury until the rights of the parties can be finally adjudicated, the Court will not, on the hearing of an application to grant or to vacate a preliminary injunction, decide questions of title to the property in dispute but will reserve such questions until the final hearing upon the merits."

Id., Sec. 110.

"The legitimate purpose and function of a temporary or preliminary injunction is to preserve matters *in statu quo* until a hearing; if it undertakes or if its effect is to dispose of the merits of a controversy without a hearing, or if it divests a party of his possession or rights in property without a trial, it is void."

Id., Sec. 112, p. 128.

Interlocutory injunctions are granted to *preserve the property and statu quo* pending the determination of the suit.

Pomeroy's Equity Jurisp., Vol. V., Sec. 264;
Pomeroy's Equitable Remedies, Vol. I., Sec. 264, p. 482.

"The controlling reason for the existence of the right to issue a preliminary injunction is that the Court may thereby prevent such a *change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated.*"

Note 6, *Pomeroy's Eq. Jurispr., Id.*

"The object of an interlocutory injunction is to *maintain the matters in question in the suit in statu quo,* until the hearing of the cause."

Daniels Ch. Pl. & Pr., 6th Am. Ed., Vol. 2, star page 1661 (bottom paging, p. 1660).

"Where a party sues in respect to an alleged injury to his legal rights, it seems that *an interlocutory injunction is granted solely upon the principle of preserving property until a decision on the legal rights can be had.*"

Id., p. 1640, bottom paging, p. 1633.

"A preliminary injunction, or, as it is sometimes called, injunction *pendente lite,* is a provisional remedy granted before the hearing on the merits for the purpose of preventing the perpetration of wrong, or the doing of any act whereby the rights in controversy may be materially injured or endangered before the final decree, and its purpose *is to preserve the subject of controversy until an opportunity is afforded for a full and deliberate investigation.*"

Ency. of Pleading & Practice, Vol. 10, p. 878.

"The right asserted by complainant, however, must be perfectly clear and free from doubt *where the effect of a preliminary injunction will be more than merely the maintenance of the status quo,* or where the injunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction."

Cyc. of Law & Proc., Vol. 22, p. 752.

What is *status quo?*

"And by the *status quo* which will be preserved by preliminary injunction is meant the *last actual, peaceable, non-contested* condition *which preceded* the pending controversy."

High on Injunctions, Sec. 5a, p. 10.

"The modern cases, therefore, have established the rule that the *status quo* which will be preserved by preliminary injunction *is the last actual, peaceable, non-contested status which preceded the pending controversy."*

Frederick v. *Huber,* 37 Atl. Rep., p. 90.

(Italics ours.)

PRELIMINARY INJUNCTION BINDS ALL PARTIES HAVING KNOWLEDGE THEREOF AND ANY VIOLATION OF STATUS QUO IS GROSS ABUSE OF ORDER OF COURT.

"Where an interlocutory injunction is awarded a complainant, he should not be allowed to do with impunity that which he has restrained the defendant from doing."

Lindley on Mines, Vol. III, Sec. 872, p. 2193.

"The violation of his own injunction by plaintiff, *where its purpose is to preserve the existing status, is a gross abuse* of the mandate of the Court, for which the injunction may be dissolved."

Beach on Inj., Sec. 289, p. 302, Vol. I.

"So it is said to be *gross abuse* of the process of the Court for him (complainant) after *having by means of the injunction tied the hands of his adversary, to disregard his own injunction.* So this principle was applied where an injunction was granted restraining defendant from mining or disposing of any ore pending the suit and complainant subsequently ejected defendant and took possession of the mine."

Joyce on Injunctions, Vol. I, Sec. 256-a, p. 407.

"And where plaintiff in an action of ejectment, having obtained an injunction to prevent waste by defendant on land, the principal value of which consisted in its pine timber, went upon the land with a force of men and cut a large quantity of timber with the purpose of removing it, it was

held that for this *abuse* of the process of the Court, the injunction might, on defendant's application, have been revoked."

Id., Sec. 1187, p. 1717.

"In ejectment for the recovery of lands which are chiefly valuable for their timber, when plaintiff before establishing his right obtains an injunction restraining defendants from the commission of waste and then immediately proceeds to cut timber upon the premises for the purpose of removing it, such action is regarded as a violation of the spirit of the injunction and as a gross abuse of the process of the Court which would justify the dissolution of the injunction should the application be made."

High on Injunctions, Sec. 679.

"Wherever there is grave doubt as to the ultimate ownership of the ore or coal, and where the plaintiff shows a *prima facie* case, as in a case of disputed boundaries, *the Court that did not tie the hands of both parties pending the final hearing* would be, to say the least, not alert to the justice of the situation."

Snyder on Mines, Vol. 2, Sec. 1626.

". . . The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, this Court will not confer its equitable relief upon the party seeking its interposition and aid, *unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to*

the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy. It says, in effect, that the Court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as *he* also may be entitled to in respect of the subject-matter of the suit. This meaning of the principle was more definitely expressed by an eminent judge in the following terms: 'The Court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which the Court would not otherwise enforce.' In this narrow and particular sense the principle becomes a universal rule governing the courts of equity in administering all kinds of equitable relief, in any controversy where its application may be necessary to work out complete justice."

Pomeroy's Equity Jurisprudence, 3rd Edition, Vol. I, Sec. 385.

". . . But this is not indispensable, nor is it even always possible. The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant which could not be obtained by him in any other manner,—that is, which a court of equity, in conformity with its settled methods, either would not, or even *could* not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff."

Sec. 386, *Id.*

". . . And for this purpose the plaintiff will be required, as a condition to his obtaining the relief which he asks, to acknowledge, admit, provide for, secure, or allow whatever equitable rights (if any) the defendant may have, and to that end the Court will, by its affirmative decree, award to the defendant whatever reliefs may be necessary in order to protect and enforce those rights. This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies."

Sec. 388, *Id.*

"It must be conceded that Courts should exercise due discretion in granting injunctions to restrain alleged irreparable mischiefs. Parties are sometimes improperly restrained, to their serious injury. When the title of the plaintiff is disputed in the answer, the Courts should be still more cautious. But in all cases, it is matter of sound discretion. It may be properly said, however, that when there is reasonable ground to apprehend the commission of irreparable mischief, pending the litigation, and the title be matter of doubt, *the Courts should restrain both the parties,* or appoint a receiver, under proper circumstances. *The party restrained, in a case of reasonable doubt, has, at least, these advantages:* First, *The property is left untouched for the time, and, upon the termination of the suit in his favor, returns to him unimpaired.* Second, He has not only his remedy against the opposite party, but also against his sureties. But in case the party is not restrained, and the suit should terminate adversely to him, the other party must rely solely upon his personal responsi-

bility. It is true, notwithstanding all these advantages, he may suffer very seriously; but as it is matter of doubt who has the right, and some one must incur the risk pending the litigation, the risk would be less on his than on the other side."

7 Cal. Reports, Merced Mg. Co. v. *Fremont,* p. 328.

"The fundamental question in every suit in equity is, on which side is justice? Law, unfortunately, is sometimes not justice; but equity always is,—so much so that in one of the townships within this judicial district the justice of the peace is understood to maintain on one page of his docket 'The Justice's Court' of law, and on the opposite page a 'Court of Justice,' and to give to suitors before him the choice of forums. There may not be any law for such action on the part of that distinguished magistrate, but Congress has constituted the Circuit Courts of the United States, both courts of equity and courts of law, and all suits that are here brought on the equity side of the Court must be governed and controlled by the eternal principles of right."

Cosmos Co. v. *Gray Eagle Oil Co.,* Vol. 104 Fed. Rep., p. 20.

"Where as in this case the evident purpose of the writ is to preserve the existing status of property in litigation until a final adjudication can be had, it is *gross abuse* of the process of the Court for the complainant to disregard his own injunc-

tion after having by means thereof tied the hands of his adversary."

Van Zandt v. *Argentine Min. Co.,* 48 Fed., 770.

"Before leaving the case we deem it our duty to refer to the fact, which appears in the record, that immediately after he had obtained an injunction, which in effect, restrained the defendants from cutting timber on the premises in controversy (each party claiming to be the owner of such premises and timber), the plaintiff, with a number of employees, entered upon the premises and felled a large quantity of the timber thereon. At that time neither party had established a right thereto. In that respect they were on equal ground. If there were valid reasons for restraining the defendants from cutting the timber, it was proper for the same reasons to restrain the plaintiff from doing the same act. *Evidently the spirit of the injunction was to* preserve the property in controversy so that the prevailing party might have it unimpaired. The plaintiff invoked the extraordinary powers of the Court to accomplish that purpose *and then in entire disregard of the object and spirit of the injunctional order which he had obtained attempted to seize and appropriate to his own use the most valuable portion of the property in controversy before his right thereto had been adjudicated. This was a gross abuse by the plaintiff of the process of the Court, which to say the least should have been severely censured by the Court. Had an application therefor been made the Court would have been justified had it dissolved the injunction and refused further to exercise its discretionary powers for the protection*

of the plaintiff. Courts should see to it that their process be not used as instruments of wrong and oppression.

Haight v. *Lucia,* 36 Wis., 356, 361-2.

"The effect of the injunction was to restrain him from the commission of the acts mentioned in the injunction. It did not restrain the complainant from the commission of any act. There are, however, numerous and well-considered cases where the courts have held that, although the complainant was not restrained, he could not 'with impunity do the acts which at his instance the defendant has been restrained from doing,' and that, where the evident object and purpose of the writ are to preserve the existing status of the property involved in litigation until a final trial and adjudication can be had, 'it is a gross abuse of the process of the Court for the complainant to disregard his own injunction, after having, by means thereof, tied the hands of his adversary.' . . . There is no doubt, therefore, that upon a proper showing to the effect that a complainant is not acting in good faith, and has either sought for and obtained, or uses, an injunction for the purpose of enabling him to obtain an undue advantage over the opposing party, the Court could and should interfere to prevent the commission of any act by the complainant having that tendency by restraining him, as well as the defendant, from doing such acts, or any act that would materially disturb the existing status of the property in litigation; or, as is held in some of the authorities above cited, the Court might dissolve the injunction against the defendant."

Silver Peak Mines v. *Hanchett,* 93 Fed., 76, 77-8.

"The word 'Irreparable' means that which can not be repaired, restored, or adequately compensated for in money or where the compensation can not be safely measured. . . . An injury to realty may be incapable of compensation in money for several reasons. 1. It may be destructive of the very substance of the estate. 2. It may not be capable of estimation in terms of money. 3. It may be so continuous and permanent that there is no instant of time when it can be said to be complete so that its extent may be computed. 4. It may be vexatiously persisted in in spite of repeated verdict. . . .

" 'Where the defendant is engaged in removing from the complainant's estate that which constitutes its chief value—for instance, lumber—the case is one peculiarly within the province of a court of equity through its preventive writ to interpose and stop the mischief complained of and preserve the property from destruction. And if a preliminary order restrains one of the parties from interference with the property in dispute *and leaves the other free to so interfere, the Court will modify such order so as to do equal justice to the parties and keep the property in statu quo until the determination of the controversy as to title and their respective rights.* . . . If it undertakes, or if its effect is, to dispose of the merits of a controversy without a hearing, or if it divests a party of his possession or rights in property without a trial, it is void.' 1 *Beach on Injunction,* Secs. 110, 112."

Bettman v. *Harness,* 42 W. Va., 433; 36 L. R. A., 571.

PRELIMINARY INJUNCTIONS CANNOT OPERATE TO CHANGE THE POSSESSION.

"Hands off of any and everything within my surface lines, extending vertically downward, until you *prove* that you are working upon and following a vein which has its apex within your surface claim."

Consolidated Wyoming Gold Min. Co. v. *Champion Min. Co.* (C. C.), 63 Fed., 540 (Judge Hawley).

Quoted approvingly by the Circuit Court of Appeals, Ninth Circuit, in

St. Louis Mg. & Milling Co. of Montana et al., v. *Montana Mg. Co.,* 113 Fed., 900-903.

"It has been decided repeatedly that any decree or order divesting possession or rights on a preliminary inquiry, is illegal and void so that no one need respect or obey it."

T. & B. C. R. Co. v. *Iosco,* 7 N. W., p. 65, 66.

"No Court can by a preliminary *ex parte* order or process turn even a wrong-doer out of possession."

People v. *Simonson,* 10 Mich., pp. 335, 337.

"Under the earlier practice, both in England and in this country, equity refused to restrain trespasses to land, and left the party to his legal

remedy. As late as the time of Lord Thurlow, injunctions were refused in such cases. Even quite recently courts of equity have refused relief in such cases. But the evident injustice of permitting the actual destruction of the subject-matter in dispute during the delay necessarily incident to the establishment by judicial determination of the rights of the parties led the equity courts to interfere, not to decide the dispute as to the legal title, *but to save the property from destruction* until the law courts should, by a proper proceeding, adjudge the rights of the parties. In the Flamang Case, cited in *Hansen* v. *Gardiner,* 7 Ves., 307, Lord Thurlow in order to prevent irreparable mischief allowed an injunction, though the right of the complainant was not established; and in the Hanson Case Lord Eldon followed that authority. The jurisdiction assumed by the courts of equity in such cases is not for the determination of the controversy as to the title, *but simply for the preservation of the subject-matter in dispute from destruction."*

Johnson v. *Hughes,* 43 Atl. Rep., p. 901.

". . . the necessary effect of the order made by respondent, if heeded or enforced, would be to dispossess the relator, exclude him from the property, and transfer his possessory right to Phillips, who was left free to enter and reap where he had not sown. Phillips was, it is true, claiming the land; but he did not occupy it; and the injunctions were, therefore, not granted for the purpose of preventing a threatened invasion of a present actual possession. *Clearly the action of respondent in attempting to take from relator, without a hearing or an opportunity to be heard, the possession of real and personal property which he*

claimed, and still claims, was rightfully his cannot be justified as an exercise of judicial power.. The provisional injunction was never designed to transfer the possession of property from one litigant to another. A court or judge cannot thus dispossess a party, and then compel him to produce evidence and establish his title in order to obtain restitution. 'It has been decided repeatedly,' says Mr. Justice Campbell, in *Railroad Co.* v. *Iosco Circuit Judge,* 44 Mich., 479, 7 N. W., 65, 'that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void so that no one need respect or obey it.' In *Calvert* v. *State,* 34 Neb., 616, 52 N. W., 687, a case which is in no material feature distinguishable from the one at bar, it was held that the provisional injunction allowed by the district judge was absolutely null. In the opinion, written by Maxwell, C. J., it is said: *'A temporary injunction merely prevents action until a hearing can be had. If it goes further, and devests a party of his possession or rights in property it is simply void.'* This statement seems to be fully sustained by the adjudged cases in other jurisdictions, and we have found no decision giving color or countenance to a contrary view. But whether the action of respondent be regarded as absolutely void, or only voidable, as his counsel contends, it is manifestly an abuse and perversion of process that ought to be speedily corrected."

State v. *Graves,* 92 N. W. (1902), 144.

"The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. In several cases it has been decided

that possession of lands is not to be disturbed by means of a preliminary injunction. *Hemingway* v. *Preston,* Wal. Ch., 528; *People* v. *Simonson,* 10 Mich., 335. Under the case last mentioned the injunction issued in this case might have been disregarded with impunity, and very serious questions might have arisen had the entrance of complainant upon the premises been resisted by force. A similar prejudgment of controversies, by the appointment of receivers, has been held in several cases to be wholly unwarranted by law. *Port Huron, etc. R. Co.* v. *Judge of St. Clair Circuit,* 31 Mich., 456; *Port Huron, etc. R. Co.* v. *Jones,* 33 Mich., 303."

Arnold v. *Bright,* 2 N. W. Rep., p. 16.

"While under certain circumstances a complainant out of possession may be awarded an injunction preventing destruction of the property, it should be in cases where an action at law is either pending or contemplated, and ancillary thereto so as to preserve the *status quo.*"

Buchanan Co. v. *Adkins,* 175 Fed., pp. 692-698 (C. C. P.). (1909.)

". . . it is only those who have a clear legal title to land, as well as its actual possession, who have a right to claim the aid of a court of equity to give them peace."

Id., pp. 698-699.

"An injunction requiring a party to do a par-

ticular thing, as to surrender possession of premises, is never allowed before final hearing."

Kamm v. *Stark,* 1 Sawyer, 547;
Daniels Ch. Pl. & Pr., Vol. 2, 6th Am. Ed., star p. 1662, end of note 2.

"There are cases in which it is said that, although the only equity ground of jurisdiction was a necessity for the exercise of the restraining power of the Court by injunction, equity went on and passed upon the legal rights of the litigants, but in every instance the case was one of accident, fraud, mistake, or account, belonging to the general concurrent jurisdiction of equity; *in no case has any court proceeded so far as to hold that, having taken jurisdiction to restrain a trespass to real estate, it would go on and determine the legal title to the land, when that was in dispute and a trial by jury was necessary, by reason of controverted matters of fact, such as possession,* boundary and location. On the other hand, there is an abundance of authority holding the contrary doctrine."

Freer v. *Davis,* 59 Law. Rep. Ann., W. Va., pp. 556, 560, 561.

FEDERAL EQUITY COURT CANNOT ENTERTAIN BILL TO TRY TITLE TO LAND.

"In the Federal Court the application for preventive relief by injunction is an ancillary proceeding and requires the institution of a separate equitable action in aid of the action at law."

Lindley on Mines, Vol. III, Sec. 872, p. 2194.

"Equity will not entertain a bill merely to try and enforce the legal title to land. . . . Where irremediable waste is being done or threatened the authority of the Court is exercised in such cases, through its preventive writ, *to preserve the property from destruction* pending legal proceedings for the determination of the title."

Erhardt v. *Boaro*, 113 U. S., 537.

"The ancient rule of non-interference of courts of equity with trespass to real estate, the title to which is in dispute, has been relaxed, but to what extent? Only to the extent that courts of equity, *when the injury is such as tends to the destruction of the property*, and is, therefore, irreparable, and justice requires that the act of trespass be prevented until the title can be determined in a court of law, will so prevent it by injunction. That is the limit set by the authorities. Citing in *Erhardt* v. *Boaro*, 113 U. S., 538, . . . *High on Inj.*, Sec. 732, says:

"'The jurisdiction in restraint of trespass to mines is not an original jurisdiction of equity, under which the Court would be justified in trying the title to the mines themselves, and the party aggrieved must, therefore, first establish his title at law, or show satisfactory reason for not doing so.'"

Freer v. *Davis*, 59 Law. Rep. Ann., p. 561.

The real object of complainant is "to settle adverse titles, . . . to secure possession of land held by others, . . . to obtain by the decree of a chancellor that which under our jurisprudence can only be had by a judgment rendered on the verdict of a jury. Sec. 723, U. S. Comp. St.

1901, p. 583, is as follows: 'Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.' All suits which have for their object a judgment for the recovery of either real or personal property should be prosecuted on the law side of the Courts of the United States, and this rule cannot be obviated by an allegation of fraud, or a conspiracy, because of the constitutional right of the defendants to a trial by jury."

Buchanan Co. v. *Adkins,* 175 Fed. Rep., p. 700.

For the reasons stated we ask that the judgment of the lower Court be reversed, and the injunction in said case be dissolved.

W. H. METSON,
FRANK R. WEHE,
BRUCE GLIDDEN.

METSON, DREW & MACKENZIE, and
E. H. RYAN,
Of Counsel.

No. 2909

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Appellee.

BRIEF FOR APPELLEE.

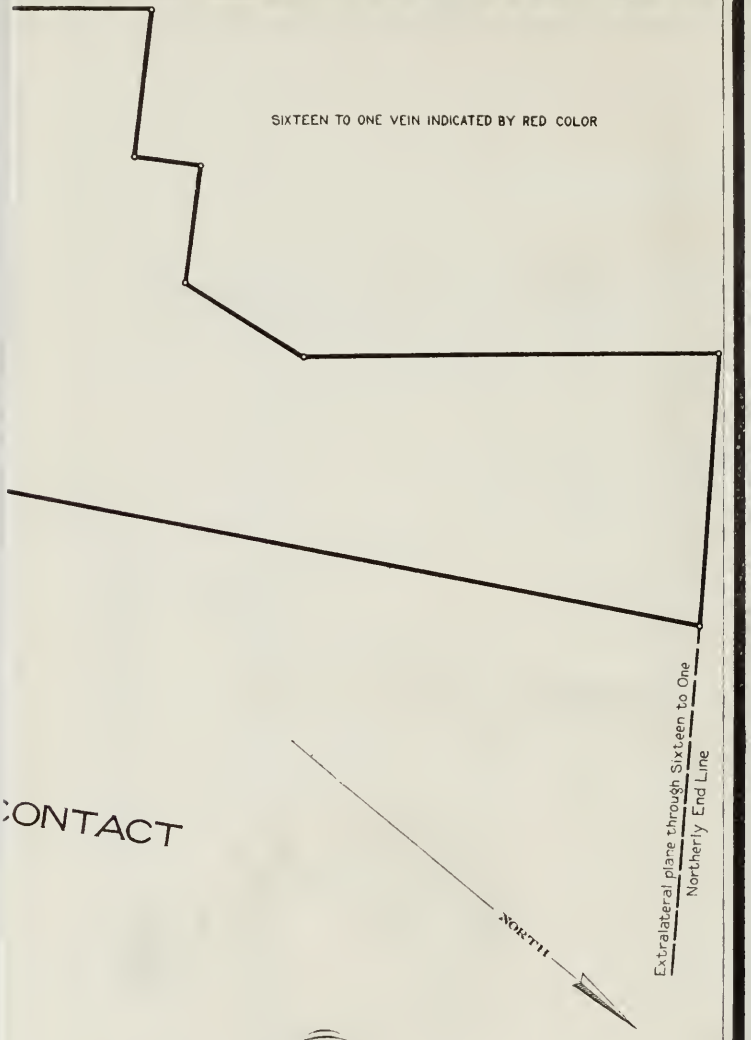
WM. E. COLBY,
GRANT H. SMITH,
Attorneys for Appellee.

Filed this 1st day of February, A. D. 1917.

FRANK D. MONCKTON,
Clerk.

By ——————————,
Deputy Clerk.


SIXTEEN TO ONE VEIN INDICATED BY RED COLOR
SIXTEEN TO ONE
EAGLE
21 CLAIM
CONTACT
BELMONT
OPHIR
VALENTINE
ECLIPSE EXTENSION
MAP
SHOWING
WORKINGS OF THE
SIXTEEN TO ONE MINE
And Portion of
TWENTY ONE TUNNEL
Alleghany Sierra County,
CALIFORNIA



MAP

SHOWING

WORKINGS OF THE

SIXTEEN to ONE MINE

And Portion of

TWENTY ONE TUNNEL

Alleghany, Sierra County,

CALIFORNIA

Compiled from Exhibits and Affidavits.

SCALE

No. 2909.

In the United States Circuit Court of Appeals for the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Appellee.

Brief for Appellee.

STATEMENT OF THE CASE.

The statement of the case appearing in appellant's brief omits many facts which are material to a presentation of this appeal from appellee's standpoint, and in order that these omitted facts may appear in their proper sequence, the following restatement of the case is made:

For purposes of explanation and convenient reference, two plats are inserted in this brief, which show the mining properties of both parties, the mine workings and the vein, in horizontal and in vertical sections. (Opp. p. 20 of this brief, for vertical section.)

The plaintiff below (appellee) is the owner of the Sixteen to One lode mining claim. Defendant (appellant) is the owner of the Belmont, Tightner Extension, and Valentine claims. The Ophir and the Eclipse Extension claims, shown on the map, belong to third parties. For many years prior to the com-

mencement of this action, plaintiff and its predecessors in interest were engaged in developing the Sixteen to One vein, which apexes in said claim and extends on its dip beneath the surface of the adjoining Tightner Extension, Belmont, and Valentine claims, owned by defendant. Plaintiff had sunk the "Sixteen to One Shaft," following down upon or in the immediate vicinity of the Sixteen to One vein, until, in August, 1916, at a depth of about 700 feet, on the inclination, plaintiff's shaft connected with an upraise of defendant, which extends a short distance upward on the vein from defendant's "Twenty-one Tunnel," which tunnel enters the mountain far below plaintiff's workings. Plaintiff thereupon found that defendant was actively engaged in mining high-grade ore from the stope marked "Trespass Stope" on the map, which is more than 700 feet below the apex of the vein measured on the dip or inclination (Tr. 17, 22, 29), and vertically beneath the surface of the Eclipse Extension claim, owned by a third party. Finding that the vein in defendant's workings, and on which defendant was mining, was plaintiff's Sixteen to One vein—contrary to the claim theretofore made by defendant that it was mining on a different vein (Tr. 60)—plaintiff immediately filed an action for damages on the law side of the court below (Tr. 8), and, ancillary thereto, filed a bill in equity for the purpose of preventing a continuance of the alleged trespass (Tr. 1).

The court below issued a temporary restraining order, and, after a hearing, issued a preliminary in-

junction directed against defendant and conditioned upon the filing by plaintiff of a bond for $30,000 to indemnify defendant if wrongfully restrained, which bond was filed (Tr. 93).

For some time prior to the commencement of these actions plaintiff, in the orderly progress of its mining operations, had been engaged in mining extralaterally on the Sixteen to One vein, as it passed on its dip immediately beyond the surface of its Sixteen to One claim, and, at the time the restraining order was issued, was working and extracting ore on its 250 foot level and vicinity, directly beneath the surface of defendant's Belmont claim (Tr. 102). Defendant's motion to dissolve the injunction against it was based upon the resumption of mining by plaintiff at this point.

Immediately upon the issuance of the order restraining defendant, on or about August 2, 1916, plaintiff voluntarily ceased work outside of its vertical boundaries upon advice of its counsel, and this cessation continued after the issuance of the preliminary injunction (Tr. 107, 108). In order to relieve itself from the hardship of such cessation (Tr. 110), plaintiff, on October 3d, 1916, filed a notice of motion to compel defendant to furnish a bond to indemnify plaintiff against the damage it was suffering by reason of its cessation of work on the extralateral segment of its vein and the consequent inability to operate its plant pending this litigation (Tr. 88). This vein is the main vein of the Sixteen to One claim, and presents practically the only opportunity for plaintiff to develop ore.

Within the vertical boundaries of the Sixteen to One claim there is a very limited opportunity for discovering and developing ore (Tr. 108), and, if plaintiff were compelled to cease mining on the Sixteen to One vein extralaterally, it would have to shut down its plant and would suffer material damage and great hardship (Tr. 101, 109).

On October 9, 1916, the court below denied this motion, stating that the matter was not properly before it for determination (Tr. 101). For the sole purpose of testing the matter and obtaining relief from this hardship, and acting under advice of counsel, plaintiff, on or about October 10, 1916, caused defendant to be notified in writing of plaintiff's intention to proceed with the extraction of ore extralaterally, stating that the object of such mining was to raise squarely the question as to whether or not plaintiff was entitled to the protection of a bond (Tr. 103).

Thereafter, on or about October 11, 1916, for the reasons above given, and in pursuance of said notice, plaintiff resumed mining extralaterally on its Sixteen to One vein, vertically beneath defendant's Belmont claim, in the vicinity of its 250 foot level and but a short distance eastward from the vertical side line boundaries of its Sixteen to One claim.

On November 17th, 1916, and more than a month after plaintiff had resumed mining, defendant served and filed its notice of motion to dissolve the preliminary injunction theretofore secured by plaintiff, basing the motion on the ground that plaintiff had resumed mining, as aforesaid, and had

thereby violated the spirit of the injunction (Tr. 94).

Thereafter, on November 21, 1916, Honorable William H. Hunt, sitting in the place of Honorable William C. Van Fleet, heard the statements of the respective parties on the motion and ordered plaintiff to cease operations under defendant's surface until Judge Van Fleet could hear and decide the matter (Tr. 99–100). On December 22, 1916, Judge Van Fleet, after conferring with Judge Hunt, as stated in the Memorandum Opinion (Tr. 89), denied the motion but granted the defendant, if it so desired, a cross-injunction restraining the plaintiff pending the suit from further prosecuting mining operations extralaterally, on the disputed vein, upon defendant giving a bond in the sum of $30,000 to indemnify plaintiff against any damages suffered by plaintiff from such restraint (Tr. 90). Defendant has not seen fit to avail itself of this privilege but has taken this appeal from the order denying the motion.

ARGUMENT.

THE QUESTION PRESENTED BY THIS APPEAL.

Defendant appears to believe that the injunctive order against it should be dissolved, because plaintiff continued its mining operations after defendant was restrained. We are certain that no such result will follow, because the dissolution of an injunction is largely in the discretion of the trial court, and it

is plain that such discretion has not been abused. The record clearly shows that plaintiff's action was not contemptuous and not in violation of the spirit of the injunction. Plaintiff gave notice of its purpose, both to the trial court and to defendant, and, as has been stated, sought the aid of the trial court to secure indemnification before resuming work.

Practically, the only question for this court to determine is whether, under the circumstances of this case, plaintiff is equally bound by the injunction issued against defendant.

While defendant has specified several errors in its assignment (Tr. 115–118), they are obviously designed to cover the one situation raised by the denial of the motion to dissolve the injunction, and they can all be resolved into the one question which is here presented for determination, to wit:

Will equity compel plaintiff to cease mining on the vein in dispute (in workings long in its possession and which have never been in the possession of defendant), without any indemnification against the damage to be suffered thereby, merely because plaintiff has caused defendant to be restrained, under the protection of a heavy bond, from mining ore in said vein at a point remote from plaintiff's workings?

Defendant was properly given the protection of a bond indemnifying it against damage occasioned by the issuance of the injunction restraining it from mining. Can it be the rule of equity that plaintiff, because it attempts to protect its property, must suffer identical damage by reason of cessation of its

mining operations, and be denied the protection of a similar bond?

If defendant's contention is upheld, it amounts to this: A complainant that comes into court to restrain another from destroying its property must suffer, as a penalty for commencing such proceeding, a complete renunciation of its own rights. By being the actor or moving party in the court, plaintiff automatically restrains itself and is not entitled to the same protection by bond that defendant enjoys, even though plaintiff suffers similar damage. In other words, an injunction operates equally on both parties and on different segments of the vein, and the one first enjoined is the only party entitled to indemnification.

It has been held in some cases, and under certain conditions, that an order of injunction binds both parties equally; but the rule depends upon the facts, and our argument is directed to the facts in this case.

When this action was begun, defendant was mining on the vein at much greater depth than plaintiff, being able to enter the vein through its tunnel some 700 or 800 feet below the apex of the vein, measured on its dip. Defendant, at the time, was mining and extracting high-grade ore from the "Trespass-Stope" on the Twenty-one tunnel level and vertically beneath the Eclipse Extension claim belonging to a third party. Several hundred feet above where defendant was working, plaintiff for some time prior, and up to the commencement of these proceedings against defendant, had been mining in the vicin-

ity of its 250-foot level on its main Sixteen to One vein as it passed on its dip outside of the vertical boundaries of its Sixteen to One claim; a portion of which level is situated vertically beneath Sixteen to One surface and the remainder beyond and beneath the surface of defendant's Belmont claim.

Plaintiff, wishing to be absolutely fair and equitable in the matter, though suffering serious loss thereby (Tr. 109, 110), upon the issuance of the injunction against defendant, ceased working underneath defendant's Belmont surface and gave defendant ample time and opportunity to apply for a cross or reciprocal injunction. No such application was made.

Instead of seeking this plain, equitable and appropriate relief, defendant waited for more than a month after plaintiff had resumed mining and made the motion to dissolve the injunction already issued against it.

Because plaintiff had used every rational means to compel defendant to meet the situation and do the fair and equitable act of indemnifying plaintiff against the same damage that plaintiff had secured defendant against, the contention is advanced by defendant that plaintiff violated the injunction which by its own terms was directed solely against defendant and its associates.

The direct result of granting defendant's motion would have been to leave both parties without restraint of any kind and to have thrown open the door again so that defendant could proceed to extract "high-grade" ore without interference. The Court

below, after due deliberation and conference with another judge who has had great experience in determining questions involving mining law, denied defendant's motion but, at the same time, gave defendant the opportunity to restrain plaintiff from further mining on complying with the same just and fair terms that plaintiff had earlier met in securing the injunction directed against defendant. Plaintiff at all times has been ready, as of necessity it must, to submit cheerfully to such restraint.

We respectfully submit that this situation speaks for itself, and upon grounds of plain, every-day justice and equity defendant should, in all fairness, do what plaintiff has already done, and willingly furnish a similar bond to indemnify plaintiff against similar damage and thus preserve the *status quo.*

THE EFFECT OF THE INJUNCTION ON POSSESSION.

The element of possession of the ore bodies in dispute and the effect of the injunction on such possession becomes an important factor in the consideration of this case. It has been made so much of by defendant's counsel, who throughout their brief have repeatedly stated that plaintiff "enjoined defendant out of possession and complainant into possession," that we shall endeavor to correct this erroneous statement and the erroneous conclusions which are built up on it.

It becomes necessary to go back to the situation existing prior to the issuance of the injunction. Plaintiff was in the exclusive possession of its Six-

teen to One claim and of the apex of the Sixteen to One vein on which it was mining, as this vein passed down on its dip beyond the side-lines of the claim and underneath adjoining territory owned by defendant. Just across its side-lines, in the vicinity of its 250-foot level, it was mining, and it was also engaged in sinking its incline shaft and extending therefrom the 300 and other levels and workings until finally at about the 700 level point it broke into defendant's upraise on the same vein extending a short distance up from the defendant's Twenty-one tunnel. Defendant's nearest workings were over 700 feet from the apex in plaintiff's claim measured along the inclination of the vein. As far as actual physical possession of workings and the segments of vein controlled by such workings was concerned, the plaintiff at all times had and still has possession down to the point where its workings encountered the rival workings of defendant. (This point is indicated on the surface map inserted herein.)

Defendant claims that it was enjoined out of possession and plaintiff into possession. Let us see the effect of the injunction on this actual physical possession of workings and mine openings and vein material controlled by such workings. *The injunction did not change this possession one iota.* Defendant is in possession of the same mine openings, the Twenty-one tunnel, the trespass stope and the ore bodies immediately controlled by such workings. Plaintiff could not enter these or take possession of them if it had that desire, without the permission

of defendant. Defendant retains possession, though restrained from mining, and the injunction had no effect whatsoever on such possession beyond such restraint. The trespass stope on the Twenty-one tunnel level is still in the actual physical possession of defendant, and defendant has never been enjoined out of possession of it and plaintiff has never been enjoined into possession of it. Plaintiff's mining operations, both prior to and since the issuance of the injunction, complained of by defendant, have been carried on in the vicinity of its 250 level and underneath Ophir surface, in workings that defendant never had any physical possession or control of, and that plaintiff had complete possession and control of both before and after the issuance of the injunction. Plaintiff's mining operations there were only the continuance of operations that it had been carrying on before the injunction issued. It is clear that as to the actual physical possession of plaintiff's workings, defendant was not enjoined out of possession, for it never had possession, nor was plaintiff enjoined into possession, because it already had such possession. So much for the alleged change of possession as far as actual and physical possession is concerned.

But, defendant's counsel assert, because of their ownership of the overlying surface embraced in the Belmont and Valentine claims, it was, from a legal standpoint, in possession of everything vertically beneath the surface, and that this vertical subsurface constructive possession covers the workings and min-

ing operations complained of. It should be noted that the injunction did not alter defendant's possession of the surface of its Belmont and Valentine claims. That surface is still in defendant's possession just as fully as it was prior to the issuance of the restraining process.

Let us see what happened to the possession below the surface, of the vein and ore bodies which were already clearly in the actual physical possession of plaintiff as far as plaintiff's actual workings and openings could control such possession. *Prima facie,* of course, ownership of surface is ownership of everything situated vertically beneath the surface, and possession follows legal ownership. This is defendant's argument, and is admittedly, in the absence of other controlling considerations, good common law. But this ordinary common-law rule gives way in the presence of "a location so made as to carry extralateral right," for under the mining laws of Congress possession of the surface is possession of all veins and lodes throughout their depths, the tops or apices of which are inside the surface lines, and such possession is actual and not constructive." (Lindley on Mines (3d ed.), p. 2162, sec. 865, and cases cited.)

See, also, Lindley on Mines (3d ed.), sec. 568, where he says:

> "The government being the owner of the fee may carve from it the ownership of the vein. . . . Therefore, when the Government grants a vein throughout its entire depth within certain end line planes, the title to the vein between

these planes is severed out of the adjoining land into which it penetrates, and the estate in the land overlying the dip is to that extent lessened'' (p. 1261).

''The estate thus granted in the vein is of the same dignity as that of a title in fee'' (p. 1262).

The federal statute granting the extralateral right gives the apex proprietor,

> ''*The exclusive right of possession and enjoyment* of all the surface included within the lines of their locations *and of all veins, lodes and ledges throughout their entire depth*—although such veins, lodes or ledges may so far depart from a perpendicular *in their course downward as to extend outside the vertical side lines of such surface locations.*'' (U. S. Rev. Stats., sec. 2322.)

[Italics in this brief are ours.]

Here we have a positive grant by Congress to the plaintiff of the exclusive right of possession of the Sixteen to One vein as it extends on its dip beneath adjoining surface, and we have, in addition to this exclusive right of possession, actual physical possession of these same vein segments down to the 700 level, where defendant's adverse entry and workings exist.

The following federal authorities have construed this section and abundantly support the foregoing proposition:

"It is contended that the Court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive, but actual. Said the Court in Mining Co. v. Cheesman, 116 U. S. 533, 6 Sup. Ct. 483, 29 L. Ed. 713:

" 'It is obvious that the vein, lode or ledge of which the locator may have "the exclusive right of possession and enjoyment" is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location.' "

Montana Min. Co. v. St. Louis Min. & Mill. Co., 102 Fed. 430, 435.

"It is objected that the present bill shows that the ore bodies in dispute are in the possession of the defendants, and not of the complainant,

and therefore that the latter has an adequate and complete remedy at law. The objection is untenable. Where the true owner of a mining claim is in possession of its surface, claiming title to the entire claim his possession in legal contemplation extends to everything which is part of the claim, whether vertically beneath its surface or within the extralateral right granted by Congress, which is not in the actual possession of another holding adversely. Clarke v. Courtney, 5 Pet. 319, 354, 8 L. Ed. 140; Hunnicutt v. Payton, 102 U. S. 333, 368, 26 L. Ed. 113; Montana etc. Co. v. St. Louis etc. Co., 42 C. C. A. 415, 420, 102 Fed. 430; Empire State etc. Co. v. Bunker Hill etc. Co., 58 C. C. A. 311, 315, 121 Fed. 973; Last Chance Mining Co. v. Bunker Hill etc. Co. (C. C. A.), 131 Fed. 579, 583."

U. S. Mining Co. v. Lawson, 134 Fed. 769, 772. (Affirmed in Lawson v. U. S. Mining Co., 207 U. S. 1.)

This proposition receives further reinforcement from the fact that where such carving out and severance of the vein takes place as results by virtue of the express grant contained in the statute just cited, possession of the surface is not in any sense possession of the underlying carved out and segregated segments of vein apexing outside of such surface. The situation is similar to that occurring in the eastern coal fields, where it is common practice to sever veins from the surface.

"This underlying estate may be conveyed under the same general rules, as to notice, as to recording and *as to actual possession,* as the surface. After such severance the possession of the holder of each estate is referable to his title. *The owner of the surface can no more extend the effect of his own possession downward* than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface, under the statute of limitations."

Plummer v. Hillside Coal and Iron Co., (Penn.), 28 Atl. 853.

See, also, Farnsworth v. Barrett (Ky.), 142 S. W. 1049, 1052, which states that this is the general rule on the subject even at common law.

Much more, then, will the same rule operate where the Government has by express statute carved out and severed from overlying surface the veins apexing outside such surface and under which surface such veins may pass in their downward course. If defendant had obtained a patent for its Belmont and Tightner Extension claims, the United States would have inserted the following reservation therein:

"The premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same on its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting

and removing the ore from such other vein, lode or ledge."

This is the reservation inserted in all lode patents. Surely defendant will not claim that its title held under mining locations merely is greater in this respect than if it had obtained patents therefor.

PLAINTIFF'S PROOF OF POSSESSION IS OVERWHELMING.

On a motion to dissolve an injunction, the *burden of proof* is on the defendant.

> Edison Electric Light Co. v. Buckeye Electric Co., 59 Fed. 691, 701.

That plaintiff has assumed far more than its fair burden of proof on the injunction proceedings and shown the apex of the Sixteen to One vein to exist in its claim, and the vein on its dip to extend therefrom, with legal identity and continuity unchanged, to defendant's workings, see the following affidavits by eminent geologists and mining engineers filed in the court below by plaintiff at the time the injunction proceedings were heard:

> Affidavit of Fred Searls, Jr., (Tr. 11).
> Affidavit of George O. Scarfe (Tr. 24).
> Affidavit of S. B. Connor (Tr. 19).
> Counter-affidavit of Wm. A. Simkins (Tr. 81).
> Counter-affidavit of Andrew C. Lawson (Tr. 70).

Take, for example, the affidavit of Professor Lawson, who is recognized as one of the foremost econ-

omic geologists on the Pacific Coast. After describing in great detail the position of the apex of the Sixteen to One vein and its exposure in the various workings of the mine, he states (Tr. 78):

> "Affiant further declares that the vein thus followed practically continuously, except for two minor faults, from its apex on the surface of the earth, at the portal of the Number One tunnel of the Sixteen to One mine, to the Twenty-One tunnel level is the same vein as that exposed in the Twenty-one tunnel. . . .
>
> "That there is no essential interruption on the continuity of the vein from the Number One tunnel of the Sixteen to One Mine to the Twenty-one Tunnel, nor any reason to doubt its identity throughout; that there is no change in its physical characteristics, mineral contents, character of walls, general dip and strike or in any other feature to suggest that there may be two veins and not one."

All of the other affidavits referred to corroborate this affidavit of Professor Lawson's in great detail.

Opposed to these five affidavits filed by plaintiff, defendant has filed only one affidavit by an expert. (See affidavit of Ed. C. Uren (Tr. 51). The latter elaborates a fantastic theory that is not supported by evidence furnished by any mine openings or actual vein exposures. (See Map, Exhibit "B," attached to said affidavit.) It is entirely hypothetical and conjectural, and framed to suit the exigencies of defendant's case. It is illustrated on the

cross-section here inserted. In order to escape the inexorable logic of the almost continuous exposures of the Sixteen to One vein from its apex to the deepest workings, this affiant assumed the existence of another vein which would justify the trespass of the defendant, and for its *locus* selected a convenient place in the vicinity of the 500 level of the Sixteen to One shaft, where the vein had been left in the hanging above the shaft and no continuous connection made through on the Sixteen to One vein. He asserts in his affidavit that there are two distinct veins, an easterly vein disclosed in the Twenty-one tunnel and a westerly vein disclosed in the Sixteen to One upper workings (Tr. 55). Defendant's expert makes it appear on the cross-section, Exhibit "B" attached to his sworn affidavit, that the alleged easterly vein coming up from the Twenty-one tunnel on a uniform dip at or near the 500 level point of the Sixteen to One shaft takes a sudden turn upward almost at right angles with its previous dip, and he represents this distorted vein as being a different vein from the Sixteen to One vein (Tr. 55) and as conveniently apexing in claims owned by the defendant. Not only was there no vein actually disclosed at that point but several hundred feet of absolutely undeveloped territory without a single opening or vein exposure intervened between the hypothetical right angled turn up of the vein and the surface. The dip and position of the vein where disclosed in the Sixteen to One shaft immediately above this alleged distortion and its dip and position immediately below as also shown by actual

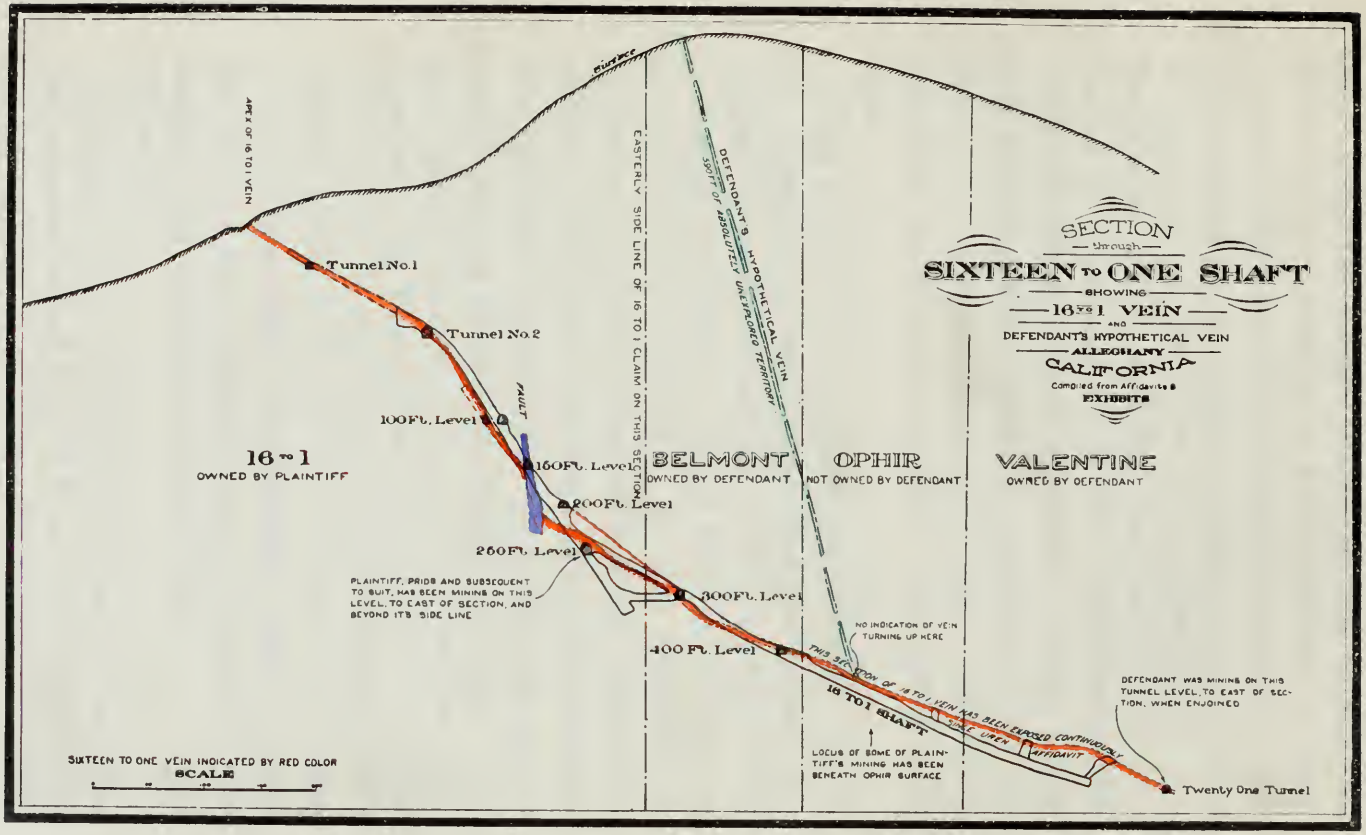
exposures of the vein were uniform and conformable so as to naturally lead to the conclusion that the known exposures were parts of one and the same vein. These facts speak for themselves, and it is quite evident that the theory of two distinct veins advanced in the Uren affidavit was for the purpose of justifying defendant's entry upon this vein by means of its Twenty-one tunnel and the extraction of ore therefrom. See cross-section plat here inserted exhibiting the true position of the 16 to 1 vein and also defendant's hypothetical vein.

That faults do not destroy the right to follow the vein extralaterally, see Lindley on Mines (3d ed.), pp. 1479–1482, of Sec. 615.

The Uren affidavit (Tr. 53) and attached map, Exhibit "A," also indicate that the apex of the Sixteen to One vein (conveniently for defendant) departs from the Sixteen to One claim through the westerly side boundary of the claim at a point just short of where an extralateral plane projected therefrom would embrace the trespass stope in which defendant was mining when enjoined.

Both of these convenient theories of defendant, which were advanced by one affiant only, in opposition to the affidavits of five experts filed by plaintiff, have been demonstrated to exist only in the imagination of that affiant.

The fact that the apex of the Sixteen to One vein is situated in the Sixteen to One claim substantially as represented by plaintiff's experts has, since the filing of said affidavits, been established by actual development. (Connor affidavit, Tr. 103,


SECTION
through
SIXTEEN to ONE SHAFT
SHOWING
16 to 1 VEIN
AND
DEFENDANT'S HYPOTHETICAL VEIN
ALLEGHANY
CALIFORNIA
Compiled from Affidavits & EXHIBITS
SURFACE
APEX OF 16 TO 1 VEIN
EASTERLY SIDE LINE OF 16 TO 1 CLAIM ON THIS SECTION
DEFENDANT'S HYPOTHETICAL VEIN
SOUTH OF ABSOLUTELY UNEXPLORED TERRITORY
Tunnel No. 1
Tunnel No. 2
FAULT
100 Ft. Level
160 Ft. Level
200 Ft. Level
250 Ft. Level
300 Ft. Level
400 Ft. Level
16 to 1
OWNED BY PLAINTIFF
BELMONT
OWNED BY DEFENDANT
OPHIR
NOT OWNED BY DEFENDANT
VALENTINE
OWNED BY DEFENDANT
PLAINTIFF, PRIOR AND SUBSEQUENT TO SUIT, HAS BEEN MINING ON THIS LEVEL, TO EAST OF SECTION, AND BEYOND ITS SIDE LINE
NO INDICATION OF VEIN TURNING UP HERE
THIS SECTION OF 16 TO 1 VEIN HAS BEEN EXPOSED CONTINUOUSLY SINCE WHEN AFFIDAVIT
16 TO 1 SHAFT
LOCUS OF BOME OF PLAINTIFF'S MINING HAS BEEN BENEATH OPHIR SURFACE
DEFENDANT WAS MINING ON THIS TUNNEL LEVEL, TO EAST OF SECTION, WHEN ENJOINED
Twenty One Tunnel
SIXTEEN TO ONE VEIN INDICATED BY RED COLOR
SCALE

104.) That the alleged distortion and turning up of the vein as portrayed on Uren Exhibit "B" does not exist in fact, and the fact that the Sixteen to One vein disclosed in the upper workings of the Sixteen to One mine is the same vein appearing in the Twenty-one tunnel workings, has also been demonstrated by actual and continuous connection on the vein itself through the intermediate territory where such erroneous representation appears on Uren Exhibit "B." (Connor affidavit, Tr. 105.) Defendant has made no attempt to refute these established facts.

What is the effect of all this on defendant's present appeal? It establishes that defendant attempted to justify its mining on the Sixteen to One vein on the Twenty-one tunnel level at the time of the preliminary injunction, by this hypothetical distortion and assertion that an entirely distinct and easterly vein apexed in defendant's surface claims. Now defendant comes before the Court and asserts that the mining operations of plaintiff in the vicinity of its 250 foot level *are on the same vein* that appears in the Twenty-one tunnel below. See affidavit of J. H. Hunt, where he states that plaintiff's mining operations on the 250 foot level are "upon the same vein which the defendant herein is, and has been by said injunctive order restrained from working and extracting ore therefrom. . . . " (Tr. 96, 97.)

Defendant has repudiated the theory of two distinct veins advanced by said Uren at the time of the hearing on the preliminary injunction. It could

not well do otherwise in the light of subsequent disclosures. There is not now before this Court any theory by which defendant can justify its alleged claim to the ore on plaintiff's 250 foot level except ownership of surface, and, as we have pointed out, this must give way to the right of an apex proprietor who is also in actual physical possession of the vein by means of workings. As an additional interesting fact, the Uren map, Exhibit "B," filed by defendant indicates that Uren believed that the 16 to 1 vein continued down from its apex in 16 to 1 surface to within a few feet of his hypothetical turning up of the vein at right angles to its former uniform dip, for he so represents it extending down in red color.

We have gone thus extensively into the facts surrounding the element of possession because it has been so strongly urged and reiterated by defendant throughout its brief that it has been "enjoined out of possession" (which is true only to the extent of the restraint against mining the ore bodies on its Twenty-one tunnel level), and that "the plaintiff has been enjoined into possession," which is not true in any sense, for plaintiff was prior to the institution of this suit in the actual physical possession of the ore bodies it has been mining and also in the actual and constructive possession of the same by virtue of the apex statute, and the injunction did not give plaintiff possession of defendant's workings, for defendant still has possession of such workings. The injunction did not, therefore, alter the possession of the respective parties one iota.

Defendant has cited a number of cases on the effect of surface ownership and the possession of the subsurface resulting from such ownership. The very utmost that can be urged for those authorities is that they are either opposed to the authorities above cited holding that apex ownership results in actual possession of the vein throughout its depth, or they do not involve the situation here presented of actual physical possession by plaintiff of the underground workings and included ore bodies where plaintiff is mining.

The case of U. S. Mining Co. v. Lawson, 134 Fed. 769, 772, heretofore cited, concedes that even the apex proprietor would not be considered in possession "in respect of the ore bodies actually embraced" in the underground workings of another. How much stronger, then, is the possession of the plaintiff in contemplation of law which has actual possession of the underground workings in the vicinity of its 250 foot level and underneath Ophir surface, which workings embrace the ore bodies it is mining and where plaintiff has in addition to such actual physical possession the actual possession which flows from apex proprietorship?

The Court below had all these facts in mind when it denied defendant's motion to dissolve the injunction and was well aware of the fact that disclosures subsequent to the granting of the preliminary injunction had demonstrated the theory of the defense there made to be without foundation.

THE AUTHORITIES CITED BY DEFENDANT ARE NOT APPLICABLE TO THE SITUATION HERE PRESENTED.

Defendant's brief contains many statements of equitable principles, citation of supporting authorities and liberal quotations therefrom, which are unquestioned law and most of which we can cheerfully indorse. We cannot, however, accept the conclusions which defendant would have us draw from these principles, and with these conclusions we take issue.

It is true that the injunctive process is invoked for the purpose of preserving the *statu quo,* but the injunction in this proceeding is directed only against the defendant and its associates. It restrains them, and plaintiff must, as a condition precedent, furnish a bond to indemnify those who are restrained if it shall be eventually determined that the injunction was improvidently issued. Here there is no bond of a similar character to protect plaintiff from equally substantial damage, which it was suffering. In none of the authorities cited by defendant in support of its contention are facts similar to these presented. And it must be kept in mind that in injunctive proceedings of this character "each case must be decided upon the facts and circumstances presented," and that in a court of equity especially, rules are not iron-clad and inflexible as defendant argues, but that many times cases arise justifying "a departure from the ordinary practice. . . . "

Edison Electric Light Co. v. Buckeye Elec. Co., 64 Fed. 225, 228.

All of the authorities cited by defendant were cases where the party securing the injunction was acting unfairly and inequitably, and yet even in those cases, what the Court said was largely *dictum.*

Take the Van Zandt-Argentine case (48 Fed. 770) for example. There the plaintiff, after securing the injunction against defendant, ejected the defendant from the same ground and commenced mining where the defendant had just been mining. If the Sixteen to One Company, after securing the injunction against defendant, had forcibly ejected the defendant from its 21 tunnel and had commenced mining in the trespass stope where defendant was operating when enjoined, the facts would be similar. Instead, plaintiff, after giving defendant plenty of time and notice, merely resumed mining in ground it was already in possession of and where it had been mining before the issuance of the injunction. Is there anything inequitable about such conduct when defendant persistently refused to protect plaintiff by a bond? The Van Zandt case did not even hold the plaintiff there guilty of contempt, but only by way of *dictum* stated the generalizations which defendant here quotes and which we readily admit were justified by the grossly inequitable conduct of the plaintiff in that case. While we are discussing the effect of this case it may be well to note that the Court there said, "The writ of injunction did not restrain the complainant. . . . Its only effect was to restrain the defendant." While the Court did intimate that under the aggravated circumstances of that case an injunction should operate

reciprocally, it did not say that such operation should be effective as against the party securing it without the imposition of terms appropriate to the circumstances of each case, such as giving a bond to protect the party reciprocally restrained against serious loss. And the ordering of bonds or imposition of similar terms in connection with the issuance of injunctive process is peculiarly within the discretion of the court below. In this connection it should be kept in mind that the Van Zandt decision was rendered by the Court of first instance, and that consequently the Van Zandt decision is of no greater weight than the decision here appealed from, and a matter entirely in the discretion of the trial court to be viewed in the light of the peculiar circumstances of each case.

Most of the later authorities cite the Van Zandt case, and this is the basis for the generalized statement appearing in Lindley on Mines, and other texts, cited on pages 28–31 of defendant's brief. Many of these authorities state that the defendant is entitled to "corresponding rights" and that "the Court should restrain both parties," but nowhere do we find these authorities upholding the highly inequitable contention made by defendant here that the Court in granting defendant these reciprocal rights cannot impose on defendant the manifestly just burden of also securing plaintiff against the damage resulting to it from such restraint.

The Merced-Fremont case (7 Cal. 328), cited by defendant on pages 31, 32 of its brief, states that the Court should restrain both parties when title is in

doubt, but it nowhere announces the inequitable rule contended for by defendant here that they should both be restrained on unequal terms.

The case of Haight vs. Lucia (36 Wis. 356, 361, 362), cited on page 34 of opposing counsel's brief, was a case similar to the Van Zandt case, in that the plaintiff entered the very premises from which defendant had been enjoined and proceeded to cut the timber. It is also to be noted that the appellate court there said that the court below "would have been justified had it dissolved the injunction, etc." indicating what we most emphatically contend that such considerations rest exclusively in the sound discretion of the court below. The appellate court nowhere intimated that in restraining plaintiff, the Court below might not as a condition have required defendant to furnish a bond.

The Silver Peak-Hanchett case (93 Fed. 76, 77, 78), cited by defendant on page 34 of its brief, was a case where the appellate court refused to interfere and dissolve an injunction obtained below. The Court did state on the authority of the Van Zandt case that upon a showing that the plaintiff was not acting in good faith and that in securing the injunction it was seeking to obtain an undue advantage over the defendant, "the Court could and should interfere to prevent the commission of any act by the complainant having that tendency by restraining him," but it does not say that the Court cannot in taking such action impose on the defendant as a condition to such restraint the same just terms as have

been previously exacted of the plaintiff. The Silver Peak case expressly states that "the effect of the injunction was to restrain him [the defendant] from the commission of the acts mentioned in the injunction. *It did not restrain the complainant from the commission of any act.*" If such be the fact, then on what theory can defendant here claim that the Court in again acting to restrain plaintiff cannot impose such just and equitable conditions as the circumstances warrant? To argue that a court of equity is powerless to thus protect those subject to its jurisdiction is to argue that "justice must yield to empty phrases."

Defendant is impaled on its own weapon when it cites Beach on Injunctions (secs. 110, 112), on page 35 of its brief, for Beach there says that where one party is restrained and the other left free to interfere with the property in dispute, a Court will modify its order *"so as to do equal justice to the parties,"* etc. Is the Court doing equal justice where both parties are restrained and only one of them protected by a bond against grievous injury resulting from the restraint?

AUTHORITIES WHICH SUSTAIN PLAINTIFF'S CONTENTION.

Counsel for defendant, on pp. 15–20 of their brief, criticise and quote from the cases of Maloney vs. King (Mont.), 76 Pac. 940, and Johnson vs. Hall (Ga.), 9 S. E. 783, which, as they say, the Court below cites in its memorandum opinion in support of its refusal to dissolve the injunction against defend-

ant in this action. It is hardly necessary to amplify defendant's quotations from those cases, for they plainly state the rule and the practice in such cases and fully justify the trial court in this case in relying upon them as authorities.

In the case of Maloney vs. King (Mont.), 76 Pac. 937, 940, the Court issued a preliminary injunction restraining defendants from extracting ore from a certain vein. Defendants appealed and the order was affirmed. Thereupon, defendants dismissed their cross-action and brought a new action in trespass against plaintiff and sought an injunction. This was denied, and defendants asked the appellate court for an order restraining plaintiff from removing ore in the second (trespass) suit pending appeal, which was denied. Then defendants dismissed the second suit and brought a third action in trespass and asked for an injunction, which was denied. It appears that defendants brought nine suits in all against plaintiff, all arising out of the conflicting ownership of the ore in said vein.

Plaintiffs in the original suit finally moved to amend the original injunctive order, so as to restrain defendant from bringing any more suits. This motion was granted and the order was affirmed on appeal.

The Supreme Court, after reciting the facts, set forth the procedure that should have been followed by the defendants in the following unmistakable language:

"The practice pursued by defendants in this regard cannot be countenanced or approved of by this Court, for at least two reasons:

1. The object of defendants sought to be accomplished by these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. However desirable such result would seem to be, it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief. Upon a hearing, if the Court concluded that a proper showing had been made, it would undoubtedly have granted the relief sought."

The concluding paragraph of the opinion, which counsel for defendant claim is applicable to their theory, is merely a recital of the power and the duty of the trial court in such cases to grant injunctive relief to both parties on proper application. If an injunction first obtained against defendant also operated to restrain plaintiff, what need was there for the defendants to have petitioned for a reciprocal or mutual injunction?

Counsel for defendant, on pp. 21, 22 of their brief, quote and misquote from the opinion in the case of Anaconda Co. v. Pilot Butte Co. (Mont.), 153 Pac. 1006, and assume to extract therefrom some authority to support their contention that plaintiff is

equally bound by an order of injunction issued against defendant. We absolve counsel from any intent to misquote, since, in a measure, they state the substance, but, in order to place the matter clearly before the Court we will state the facts in the case and quote at some length. Plaintiff sought to quiet title to its Emily vein, which passed on its dip beneath the surface of defendant's claim below the 1800 foot level, and prayed for an order restraining defendant. Defendant claimed that its vein united with the Emily vein below the 1800 foot level and that its location was prior in point of time, and sought a cross-injunction against plaintiff. The trial court issued an injunction against defendant and also partially restrained plaintiff. Concerning the restraint of plaintiff, the opinion of the Supreme Court says:

> "The order also contains the following:
>
> " 'Furthermore, the plaintiff is hereby required to maintain *pendente lite* the present status as to the said Emily vein below the 1,800 foot level of the said Badger quartz lode claim, wherever the same may be found on its dip within the surface lines of the Pilot lode claim extended vertically downward, which said Pilot lode claim is more fully described in the answer of defendant. *Except as hereinbefore otherwise provided, the application of the defendant for a temporary injunction is refused.*' "

Defendant took an appeal from the order enjoining it from mining on the Emily vein, and a separate appeal from the order quoted above restraining

plaintiff from mining on the same vein below the 1800 foot level. Evidently, the second appeal was taken by defendant because the order restraining plaintiff was not sufficiently specific to satisfy defendant, for the opinion of the Supreme Court says:

> "While the order does not specifically so declare, it in legal effect grants a reciprocal injunction restraining both parties from conducting mining operations upon the Emily vein within the Pilot claim below the 1,800 foot level. The portion of the order quoted perhaps does not express the Court's purpose in the most appropriate terms. It nevertheless enjoins upon the plaintiff the duty to preserve the Emily vein in its present condition until the rights of the parties may be finally determined. So far, therefore, as it relates to the vein wherever found within the Pilot claim, the plaintiff is effectively restrained from conducting any mining operations upon it. Hence the defendant has no cause to complain of it. If the plaintiff should disregard it and proceed to mine upon and extract ore from the vein at any point within the plane of the south boundary of the Pilot ground, the Court would, upon proper showing, subject it to punishment for contempt, and thus preserve the vein until it can be determined who is the owner of it."

From these quotations, defendant's counsel derive the conclusion that "The defendant's injunction was refused," notwithstanding the plain statement in the order quoted above that "*except as hereinbefore*

otherwise provided, the application of the defendant for a temporary injunction is refused." In other words, defendant's application for an injunction against plaintiff was granted in part.

Clearly, the plaintiff was not itself restrained by the fact that it obtained an injunction against defendant, but by an express order which was made in pursuance of the cross-application of defendant.

Counsel for defendant appear to assume that the statement of the Supreme Court that, "the order, in legal effect, grants a reciprocal injunction restraining both parties," should be interpreted to mean that plaintiff was bound by its own injunction. That the Supreme Court of Montana does not attach such meaning to the words "reciprocal injunction" is shown by its use of the same phrase in the earlier case of Maloney v. King (Mont.), 76 Pac. 940, where a mine owner, who had been enjoined, thereafter instituted new suits and sought without success, to enjoin plaintiff. Of this situation the Supreme Court says:

> "The practice pursued by defendants in this regard cannot be countenanced or approved of by this Court, for at least two reasons:
>
> "1. The object of defendants sought to be accomplished by these two suits was undoubtedly to obtain a reciprocal or mutual injunction. They, being enjoined from working the disputed ground, desired that the plaintiffs should also be enjoined, so that the premises should remain in *statu quo* pending the litigation. *However desirable such result would seem to be,*

it could have been attained in the original suit by petition on part of defendants setting forth the facts and the reasons for such relief."

The case of Anaconda Co. v. Pilot Butte Co., therefore, not only fails to support defendant's theory, but is authority for the contention of plaintiff in this case; namely, that the remedy of defendant is for injunctive relief against plaintiff upon the terms imposed by the trial court.

On motion to dissolve the injunction in this case, counsel for plaintiff cited the case of Johnson v. Hall (Ga.), 9 S. E. 783, 784, as authority for the rule that the remedy of defendant was to apply for a cross-injunction, and Judge Van Fleet, in his memorandum opinion, referred to the case as authority for his decision. Counsel for defendant quote from the opinion, every line of which quotation is contrary to their contention. Plaintiff in that case brought suit for trespass and applied for an injunction to restrain defendants from cutting turpentine trees. After defendants had been enjoined, plaintiff entered upon the land and commenced to cut trees; whereupon defendants filed a cross-petition alleging title to the land and praying for an order restraining plaintiff. After a hearing, the Court enjoined plaintiff, but without requiring a bond of defendants, as had been done in the case of plaintiff when the injunction was issued against defendants. Plaintiff appealed from the order, which was affirmed, with the condition that defendant indemnify plaintiff, in the following language:

"The Court committed no error in the ruling complained of. It appears from the record in this case that both of these parties are *bona fide* claimants to this lot of land. When Hall & Bro. were enjoined from trespassing thereon, upon the application of Johnson, Johnson had no right to commit the very act which Hall & Bro. had been enjoined from committing. Where both parties in good faith claim title to the same tract of land, and one of them is enjoined from entering or trespassing thereon upon the application of the other, the object of the injunction is to preserve the land *in statu quo* until the title is settled by the proper proceedings. The plaintiff has no more right to disturb the *statu quo* than the defendants had; and it follows, as a matter of course, that, when the plaintiff undertook to commit the same acts that the defendants had been enjoined from committing, the Court should have restrained him also, it appearing that both parties *bona fide* claimed the land. (I High, Inj., sec. 679)."

Notwithstanding the straightforward reasoning of this opinion and its manifest righteousness, counsel for defendant weakly seek to impeach it by saying that it is not supported by High on Injunctions, who is cited by the case as authority.

Furthermore, counsel suggest that the order of the Supreme Court requiring a bond from defendants as a condition of the maintenance of the cross-injunction against plaintiff must have been predicated upon some State statute (p. 21 of defendant's brief).

Counsel must be hard pressed to interject such an unwarranted assertion. The opinion of the Supreme Court of Georgia gives no intimation of such statute, but bases the requirement of a bond upon plain, everyday equity. It says:

> "But we think that the Court should have placed both parties upon equal terms, and therefore should have required Hall & Bros. to give a similar bond to the one required of Johnson in the first injunction, and we therefore direct that the Court below require Hall & Bro. to give such bond, allowing them such reasonable time as he may think proper in which to give the same, and, if they fail to comply with this order, that he dissolve the injunction as to Johnson. Judgment affirmed, with direction."

If an injunction issued against one party also operates to bind the other party, then the whole subject of cross, counter or reciprocal injunctions is meaningless, and the Courts have been performing idle acts in issuing such injunctions.

DEFENDANT HAS A PLAIN, SPEEDY AND EFFECTIVE REMEDY AVAILABLE WHICH IT REFUSES TO ACCEPT.

Defendant's entire argument running throughout its brief is based upon the erroneous assumption that defendant has no remedy, and because of the order of the Court below it must sit by helplessly while plaintiff is mining in the territory in dispute.

The motion to dissolve the injunction which defendant made in the court below was not designed to

preserve the *status quo,* which defendant contends should be the prime object in such equitable proceedings. If the motion had been granted, it would have thrown the doors wide open and defendant could have resumed operations which was doubtless the chief motive actuating defendant in urging the motion, rather than any serious claims to the ore bodies which plaintiff was engaged in mining. As already noted defendant's defense at the hearing on the preliminary injunction was the Uren hypothetical easterly vein alleged to apex in defendant's ground, which plaintiff's subsequent developments have shown to be purely imaginary as far as any relation to the 16 to 1 vein is concerned (Tr. 105).

Even assuming this Uren theory to be a fact, this imaginary vein does not include the ore bodies plaintiff is mining. Surely, counsel will not contend that defendant has a right to mine uphill and follow up past where they claimed the hypothetical right angle turn in this vein existed. Defendant has introduced no other theory of defense, and therefore comes before this Court without any substantial claim to the ore bodies plaintiff is mining except the time-worn assertion of surface ownership.

The Court below fully recognized this situation, and also recognized that plaintiff had been acting in entire good faith in the endeavor to secure protection against loss resulting from its cessation of mining operations. It therefore denied the motion and granted the defendant the privilege of obtaining a cross or reciprocal injunction restraining plaintiff

from mining upon furnishing a bond of similar character and amount to that already furnished by plaintiff. What could be more equitable? By complying with the terms of this order, defendant would have definitely and completely preserved the *status quo* that it has throughout the entire length of its brief so strongly urged should be preserved. But no; defendant insists that the *status quo* be utterly destroyed by permitting it to mine also. Where are these urgent appeals in behalf of the *status quo* and the authorities defendant has piled up to sustain this highly equitable principle? We respectfully submit that defendant has shown by its own conduct that it is not in reality interested in preserving the *status quo,* but that its main desire is to resume mining operations beneath surface that it does not even own.

But defendant insists that, to compel it to furnish a bond similar in every way to the bond already furnished by plaintiff, as a condition for restraining plaintiff from mining, might result in great hardship. On page 9 of its brief, it presents a supposititious case, where an owner of a mining claim has gone abroad and left his mine in charge of a number of miners, plaintiff might enjoin them and "these poor employees" would not be able to protect the defendant's interests. The answer to this is that if a mine owner is foolish enough to go abroad and leave his business in incompetent hands, he must suffer the consequences that all equally improvident business men under like circumstances would suffer. He would be clearly guilty of gross neglect. But that is not the situation here.

Again, opposing counsel assume a case where a defendant "without any notice whatsoever" might be required to furnish a bond forthwith, and as he had no notice could give no bond. What bearing this has on the case at bar, it is difficult to perceive. Plaintiff here stopped work for over two months, and before resuming work gave defendant notice of its intention to resume work, after endeavoring to get defendant to furnish a bond. If a plaintiff acted in the inequitable manner assumed, any Court would undoubtedly protect the defendant and require notice to be given. But that situation is not involved here.

Opposing counsel then assume that defendant might have no means or credit and be thus unable to supply a bond. The identical argument applies to the plaintiff and all parties who come before a court for injunctive or other relief. If they have neither the means nor the credit to assume the legitimate burdens imposed by the Court as a condition for obtaining such relief, they naturally do not get the relief. If such excuses were available, no bonds would ever be furnished. If plaintiff had been unable to obtain the $30,000 bond, which the Court required and which defendant insisted should be furnished, then it would not have been able to restrain defendant from working. There is nothing in the record before this Court to indicate that defendant cannot furnish such a bond. If defendant should expend the energy and money which has been necessary for it to prosecute this appeal, it is not assuming too much to venture the assertion that it could easily fur-

nish the bond required by the lower court as a condition for restraining defendant from mining.

But defendant says plaintiff is the primary actor and forced this situation by bringing this suit. Not so; defendant brought this situation on itself by trespassing on plaintiff's 16 to 1 vein, and forced the plaintiff to take immediate steps to protect its rights. The plaintiff did not seek this litigation, but was forced into it by prior acts of defendant, which were the prime contributing cause. To pursue defendant's argument a little further, it leads to this inevitable result: a party may commit a clear trespass on another's vein and if the real owner seeks to prevent and enjoins this unlawful mining and secures an injunction, the defendant is protected against possible damage by the bond furnished, but the injured party must sit by with hands tied, mutually enjoined by his own injunction, as defendant argues, and the trespasser does not have to give any bond to indemnify the real owner against the actual damage he is suffering. We venture to assert that no Court is going to be influenced by such sophistry.

THE DISSOLUTION OF AN INTERLOCUTORY INJUNCTION RESTS IN THE SOUND JUDICIAL DISCRETION OF THE COURT OF ORIGINAL JURISDICTION.

This proposition is so elementary that little space will be devoted to its discussion. The following authorities speak for themselves.

Appeal from an order refusing to dissolve an interlocutory injunction:

"The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the Court of original jurisdiction, and when that Court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 206, 120 C. C. A. 644, 648, and cases there cited."

Magruder v. Belle Fourche etc. Assn., 219 Fed. 72, 82.

In such cases the appellate court can no more determine the weight of conflicting affidavits than it can settle conflicts in the evidence on appeal from final judgments.

Home E. L. & P. Co. v. Globe T. P. Co. (Ind.), 45 N. E. 1108, 1110.

"The discretion exercised by Courts in acting upon motions for injunctions is very great, and each case must be decided upon the facts and circumstances presented. . . . "

Edison Elec. Light Co. v. Buckeye Elec. Co., 64 Fed. 225, 228.

It ill befits defendant to talk of equitable principles when it is in a court of equity refusing to do what is plain equity. If defendant has been injured, it has only itself to blame, for its remedy has been open to it from the beginning, and the court below in the order appealed from had, even without any request from defendant, held this remedy out to it. It would not seem that defendant should object to this equitable burden which is imposed in all fairness upon both parties alike for protection against similar damage occasioned each, and which burden the plaintiff has already cheerfully assumed. We ask that the order appealed from be affirmed.

Respectfully submitted,

WM. E. COLBY,

GRANT H. SMITH,

Attorneys for Plaintiff.